Supreme Court, U.S.
FILED
MAR 15 2002
CLERK

No. 01-1168

IN THE

Supreme Court of the United States

MICHAEL E. TINDALL,

Petitioner,

v.

WAYNE COUNTY FRIEND OF THE COURT,
WAYNE COUNTY SHERIFF'S DEPARTMENT,
and WAYNE COUNTY CIRCUIT COURT,
FAMILY DIVISION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WAYNE COUNTY FRIEND OF THE COURT

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The Wayne County Friend of the Court, which performs its duties under the chief judge pursuant to Michigan Compiled Laws Section 552.503(5), concurs with the Brief In Opposition submitted by the Wayne County Circuit Court, Family Division by Kirsten Frank Kelly and Michael F. Sapala.

For all of the reasons presented therein, Respondent Wayne County Friend of the Court respectfully requests that this Court deny Plaintiff's Petition for Writ of Certiorari.

Respectfully submitted,

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(6)

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In The
Supreme Court of the United States

MICHAEL E. TINDALL
Plaintiff-Petitioner
v.
WAYNE COUNTY FRIEND OF THE COURT, By JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney, Assistant Friend Of Court; WAYNE COUNTY SHERIFF'S DEPARTMENT, By: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, By: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F.SAPALA, Chief Judge
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI

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RULE 15.6 STATEMENT

Pursuant to subsection 6 of Rule 15.6, Petitioner hereby submits it Reply Brief addressing Respondents' argument C, PP 10-12, regarding the Eleventh Amendment.

I. PETITIONER'S CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT

A. MICHIGAN DOES NOT PROVIDE A FAIR AND IMPARTIAL TRIBUNAL FOR DOMESTIC RELATIONS LITIGANTS.

Respondents argue that Michigan does not "consent" to suit by domestic relations litigants challenging the illegal conduct of Michigan courts. Res. Brf. P 11. As demonstrated by this case, and, the May 30, 2000 decision of the Ingham County Circuit Court, App. H,Vol. III, Michigan courts actively and punitively discourage such challenges by manipulating their state court record; by manufacturing fallacious "standing" and "mootness" defenses; by premature dismissals;

and, by the punitive, "in terrorem" application of state procedural rules and litigation "pleading sanctions"; all designed to insulate state court actors from federal constitutional challenges to their illegal conduct. This Court has repeatedly held such state court "tactics" will not succeed as a means to evade federal constitutional review. 1

Respondents' counsel's own representations to the Ingham County Circuit Court, in the state class action, are illuminating :

> **"Plaintiff's request for relief, if granted, could have resulted in the restructuring of the family divisions of every circuit court in the state of Michigan. It could have resulted in an order of restitution amounting to millions of dollars to be paid by the State of Michigan. Thus, the potential relief requested in this case was significant. "**

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1 *NAACP v. Alabama, 357 US 449 (1958) (mandamus vs. regular appeal insufficient state procedural ground to evade federal review); Staub v. City of Baxley, 355 US 313 (1958) (standing argument insufficient to evade federal review); Henry v. Mississippi, 379 US 443 (1964) (state ground of alleged waiver is, itself, a federal question subject to review)*

Michigan courts (while technically competent to do so) actively discourage and penalize the assertion of federal constitutional challenges to their own illegal actions and procedures.

B. IN RE YOUNG DOCTRINE.

Respondents argument that an action against state officers, in their representative capacity, is an action against the State of Michigan ignores both applicable and controlling Michigan, and, federal law.

1. MICHIGAN LAW:

Expressly relying on *Ex parte Young, 209 US 123 (1907)*, the Michigan Supreme Court ruled, in *Thompson v. Auditor General, 261 Mich 624 (1933)*, that an action against an officer of the State of Michigan, in his official capacity, **is not** an action against the State of Michigan under the Eleventh Amendment. *261 Mich 624 at 628.* Thompson addressed many of the identical due

process issues presented by this case. *Id at 646-651.*

Under the Michigan Supreme Court's own interpretation of both the Michigan and the U.S. Constitutions, Respondents' acts complained of in this case are clearly illegal and unconstitutional. *Campbell v. Evans, 358 Mich 128 (1959) at 131; Dick v. Dick, 210 Mich App 576 (1995) at 583; Hoke v. Hoke, 162 Mich App 201 (1987) at 207.* Nevertheless, Respondents continue to delegate judicial power to non judicial personnel, and, referees in its family/domestic relations courts.2

2. FEDERAL LAW:

Citing *Wills v. Michigan Dept. of State Police, 491 US 58 (1989),* Respondents argue that 42 USC 1983 does not provide relief from Eleventh

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2 *See, ex., In re AMB, ___Mich App ___ (November 6, 2001), 2001 Mich App LEXIS 217(critically ill infant killed by termination of life support under WCCC* ***referee*** *issued,* ***"stamped"*** *order in "unredeemably flawed" proceedings involving no judicial review; no adequate legal representation; and, no notice or due process to parents).*

Amendment immunity in actions against a state for alleged deprivation of civil rights. Yet, this Court expressly ruled in *Wills*, identically to the Michigan Supreme Court's ruling in *Thompson*, that actions directed against state officers in their official capacity for violation of Sec. 1983 are not actions against the state, and, are not barred. *Wills, at 71, n10.*

This Court has made clear that it is the "prospective character" of the relief sought, rather than the nature of the relief (injunction), or, the nominal status of the state official defendants, that determines the validity of the action under the 11th Amendment. *Milliken v. Bradley, 433 US 267 (1977) at 288-289.* 3

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3 The court of appeals decisions cited by Respondents are clearly distinguishable on precisely this ground. *Mumford v. Basinski, 105 F.3d 264 (1997)*, expressly found a damage claim for back pay and back benefits to be retrospective rather than "prospective", therefore *Young* was inapplicable. In *Abick v. State of Michigan, 803 F.2d 874 (1986)*, no specific officer's conduct was challenged, and, no constitutional taking or other